



**Kawimbi v Modern Coast Limited (Cause 59 of 2019)
[2024] KEELRC 1777 (KLR) (4 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1777 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 59 OF 2019**

**AK NZEI, J
JULY 4, 2024**

BETWEEN

JARED EDWIN KAWIMBI CLAIMANT

AND

MODERN COAST LIMITED RESPONDENT

RULING

1. Vide a memorandum of claim dated 17/1/2018 and filed in this Court on 6/2/2018, the Claimant herein sued Modern Coast Building and Construction Limited seeking the following reliefs:-
 - a. One month salary in lieu of notice... kshs. 17,000
 - b. Salary for 13 days worked in the month of August 2017..... kshs. 7,366.70
 - c. Leave days for the 5 years workedkshs. 59,500
 - d. 12 months' compensation for unlawful termination..... kshs. 204,000
 - e. Certificate of service.
 - f. Costs of the claim and interest thereon at Court rates.
 - g. Any other relief that the Honourable Court may deem fit to grant.
2. The Claimant pleaded in the said memorandum of claim:-
 - a. that he was, on 23/8/2011 employed by the Respondent as a glass fitter in the workshop department, and worked until 13/1/2017 when his services were terminated.
 - b. that the Claimant was not issued with an employment contract, but was issued with a staff card by the Respondent and with payslips every month.



- c. that the Claimant was earning a monthly salary of kshs. 17,000 and worked 7 days a week from 08.00 hours to 17.30 hours, and at times worked till 22.00 hours.
 - d. that the Claimant was never allowed to proceed on leave during the 5 years that he worked, and was only allowed one week off for a whole year.
 - e. that on 12/1/2017, the Claimant worked as usual and left at 17.30 hours and that while on his way home (to vipingo), he was telephoned by his supervisor and asked to go back to work and to work at night. That since he had already paid bus fare home and had no money to take him back to work and his supervisor did not send him any, he requested a colleague, a Mr. Abdalla who stayed in Likoni, to go to work and to assist, and that the said supervisor agreed to that.
 - f. that on 13/1/2017, the Claimant went to work but was not assigned duties, and that in the evening, he was told to hand over all his uniforms as his services had been terminated. That the termination was unfair as the Claimant was not accorded an opportunity to be heard.
 - g. that the Claimant's dues were not paid by the Respondent.
3. Documents filed by the Claimant alongside the memorandum of claim were the Claimant's written witness statement and a list of documents dated 17/1/2018, listing 4 documents. The listed documents are the Claimant's identification card, the Claimant's job card, copies of the Claimant's payslips and a demand letter. Copies of the listed documents were also filed.
 4. The Respondent entered appearance and filed Response to the Claimant's claim, denying the same. The Respondent, however, admitted the descriptive paragraphs (1& 2) of the Memorandum of Claim which describe the Claimant as an adult of sound mind and the Respondent as a limited liability company duly incorporated in Kenya under the Companies Act (Cap 486 Laws of Kenya).
 5. On 21/9/2020, the Claimant filed a Notice of Motion dated 18/9/2020 seeking leave to amend his memorandum of claim in order "to rectify some inadvertent and excusable errors reflected on the memorandum of claim." The application, which the Respondent opposed vide a replying of its Legal Manager sworn on 28/9/2020, was considered and allowed by this Court vide a Ruling delivered on 11/2/2021 (Ndolo, J) whereby the Court stated: -
 36. That said, I will allow the Claimant's application dated 18th September 2020.
 37. Upon payment of requisite Court fees, the annexed amended memorandum of claim will be duly filed.
 38. The Respondent's right to respond to the amended memorandum of claim will be subject to payment of outstanding Claimant's costs and Court adjournment fees.
 39. The costs of this application will be in the cause."
 6. It is to be noted that one of the grounds raised by the Respondent in its said replying affidavit opposing the Claimant's aforesaid application, which application the Court allowed vide its foregoing ruling/ Orders, was:-
 - 5the claim as against the intended Respondent from the application arose on 13th January 2017 and more than three years have lapsed from the date when the cause of action arose, and should this Court allow this application, it would



violate Section 90 of the Employment Act 2007 as it would in essence allow institution of a suit with a claim that is statutorily time barred.”

7. This Court stated as follows in its aforesaid Ruling (Ndolo, J)

“26. In pursuing its objection, the Respondent pushes the argument that the Respondent and the intended Respondent are two distinct entities. The Court is not persuaded by this argument; first, the memorandum of appearance and memorandum of Response filed by the Firm of Prof Mumma & Co. Advocates on 23rd January 2020, is in the name of Modern Coast Building & Construction Ltd.

27. Additionally, on 18th February 2020 when a consent was recorded by counsel for the parties, admitting the memorandum of Response dated 20th January 2020, counsel appearing for the Respondent did not raise any objection regarding the description of the Respondent.

28. Infact, it was not until 17th September 2020, when the Court sought to know why the Respondent had not met the conditions of the aforesaid consent, that counsel for the Respondent raised the issue of the description assigned to the Respondent.

29. Parties must come to Court in good faith. A party who is admitted into proceedings on concession by the other party cannot turn around and seek to defeat the other party’s case by some lawyerly manouver. It is even worse when that party has failed to comply with clear orders of the Court.

34. As to the question whether allowing the Claimant’s application amounts to institution of a fresh suit which would be barred by limitation of time, I will say this; Modern Coast Builders & Contractors Ltd, who was evidently the Claimant’s employer, was all along aware that the Claimant’s claim was against it and not any other party.

35. It cannot therefore be said that by merely correcting the name of the Respondent a new suit has been born.”

8. The foregoing Ruling is not shown to have been appealed against.

9. A look at the amended memorandum of claim dated 18/9/2020 and filed by the Claimant pursuant to this Court’s foregoing Ruling shows that the only amendment effected was correction of the Respondent’s name from Modern Coast Building and Construction Ltd to Modern Coast Builders and Contractors Ltd, this being what the Court allowed vide its said Ruling.

10. I have taken note of the fact that in allowing amendment of the Claimant’s memorandum of claim, the Court stated that the amended memorandum of claim annexed to the application for leave to amend would be deemed duly filed upon payment of requisite Court fees. No time lines were set for the payment of Court fees. I have seen on record a Court receipt for kshs. 575 issued on 23/2/2021 on filing of an amended memorandum of claim dated 18/9/2020, which is also the date of the amended memorandum of claim annexed to the application for leave to amend. The same amended memorandum of claim appears to have been paid for again on 16/6/2022 when another copy of the said amended pleading was filed. It is to be noted that the two copies of the amended memorandum of



claim filed/paid for on 23/2/2021 and 16/6/2022 respectively are one and the same amended pleading that the Court ordered be deemed as duly filed upon payment of requisite Court fees.

11. On 3/7/2023, a day to 4/7/2023 when the suit was set to come up for hearing, the Respondent filed a Notice of Preliminary Objection calling for the Claimant's suit to be struck off on grounds:-
 - a. that the Amended suit filed on 16/6/2022 is time-barred and offends the mandatory provisions of Section 90 of the Employment Act 2007.
 - b. the Claimant's suit is frivolous, vexatious and an abuse of the Court's process, and hence ought to be struck off and/or dismissed with costs to the Respondent.
12. Parties filed written submissions on the preliminary objection pursuant to the Court's directions in that regard, which I have considered.
13. As correctly submitted on behalf of the claimant, and as extensively set out in this Ruling, the Respondent's allegation of the suit against the Respondent being time barred was considered by this Court and was determined vide the Ruling delivered on 11/2/2021, over three (3) years ago. This Court cannot sit on appeal over its own orders. The Respondent's Preliminary Objection dated 28/6/2023 and filed on 3/7/2023 is frivolous and is an abuse of this Court's process; and is hereby dismissed with costs.
14. The suit herein shall forthwith be set down for hearing.
15. Orders accordingly

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 4TH JULY 2024

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Claimant

.....Respondent

